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Office of Administrative Law Judges
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Issue Date: 27 March 2007

IN THE MATTER OF:

GC,
Claimant,

v. Case No.: 2004-BLA-5925

UNITED STATES COAL, INC.,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES: Edmond Collett, Esq.
For the Claimant

John B. Dupree, Esq.
For the Employer

Donna E. Sonner, Esq.
For the Director, OWCP

BEFORE: William S. Colwell
Associate Chief Administrative Law Judge

DECISION AND ORDER DENYING LIVING MINER'S BENEFITS

This case arises from a claim for benefits filed under the "Black Lung Benefits Act," Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, at 30 U.S.C. § 901 *et seq.* ("Act"), and the implementing regulations at 20 C.F.R. Parts 718 and 725 (2005). A hearing was held in London, Kentucky on February 2, 2006. [1] The decision in this matter is based upon the testimony of Claimant at the hearing, all documentary evidence admitted into the

[1] The hearing in this matter was conducted by Administrative Law Judge Richard Huddleston. Judge Huddleston subsequently retired and, by *Order* dated May 2, 2006, the parties were notified of the retirement and advised that the claim would be assigned to another administrative law judge. No objections to transfer of the claim were received and, by *Order* dated June 16, 2006, the parties were advised that a decision on this claim would be rendered by the undersigned Administrative Law Judge.

record at the hearing, and the post-hearing arguments of the parties. The documentary evidence admitted at the hearing includes *Director's Exhibits* (DX) 1-33, *Claimant's Exhibits* (CX) 1 and 2, and *Employer's Exhibits* (EX) 1-3.

Moreover, counsel for the Director proffered *Director's Exhibit* 34, which is her pre-hearing report. Employer's counsel also proffered his pre-hearing report as *Employer's Exhibit* 4. No objections were raised to the admission of either of these exhibits and, although Judge Huddleston inadvertently did not admit the exhibits at the hearing, it is determined that they are admitted into the record for purposes of adjudicating this claim.

Overview of the Black Lung Benefits Program

The Black Lung Benefits Act is designed to compensate those miners who have acquired pneumoconiosis, commonly referred to as "black lung disease," while working in the Nation's coal mines. Those miners who have worked in or around mines and have inhaled coal mine dust over a period of time may contract black lung disease. This disease may eventually render the miner totally disabled or contribute to his death.

Procedural History

1. The miner filed a claim for benefits on October 30, 2002. DX. 2.

2. United States Coal was notified of the claim by letter dated January 9, 2003. DX. 18.

3. On February 5, 2003, Employer filed its controversion. DX. 20.

4. On November 21, 2003, the district director issued a *Proposed Decision and Order – Denial of Benefits*. DX. 27. In his proposed decision, the district director concluded that U.S. Coal was properly designated as the operator potentially responsible for the payment of benefits. On the other hand, despite the fact that Claimant submitted evidence sufficient to demonstrate the presence of coal workers' pneumoconiosis as well as a coal mine employment history of 16 years, benefits were denied because the evidence of record did not support a finding of total disability.

5. By letter dated October 26, 2003, Claimant's counsel requested a hearing. DX. 28.

6. The claim was referred to this Office for adjudication on March 8, 2004. DX. 31.

Issues Presented for Adjudication and Stipulations

At the hearing, Employer withdrew length of coal mine employment as an issue. *Hearing Transcript (Tr.)* at 6. Employer and Claimant stipulated to 16 years of coal mine

employment for entitlement purposes. *Tr.* at 6. Moreover, Employer withdrew issue number 13 on the CM-1025 and confirmed that it has insurance coverage. *Tr.* at 7.

No party contested that Claimant has a dependent wife, Charlotte, for purposes of augmentation of benefits. DX. 31 (certificate of marriage); TR. at 16.[2]

With regard to the medical issues presented for adjudication, the Director does not dispute that the miner suffers from pneumoconiosis; rather, she contests disability and disability causation. *Tr.* at 7. Employer, on the other hand, continues to contest all four elements of entitlement; *to wit*: (1) whether the miner suffers from pneumoconiosis; (2) arising out of coal mine employment; (3) whether he is totally disabled; and (4) whether the miner's total disability was due to pneumoconiosis. *Dx.* 31; *Tr.* at 7. Employer also contests its designation as the operator potentially responsible for the payment of benefits on this claim on grounds that Claimant worked for Tennessee Coal Company for one year after leaving U.S. Coal. *Tr.* at 13-15.

Designation of the Responsible Operator

The Law

The implementing regulations at 20 C.F.R. §§ 725.491 through 725.494 (2005) contain numerous requirements for designating the operator properly responsible for the payment of benefits in a claim. Of relevance in this case are the provisions at § 725.494(c) which read, in part, as follows:

> An operator may be considered a 'potentially liable operator' with respect to a claim for benefits under this part if each of the following conditions is met:
>
> . . .
>
> (c) The miner was employed by the operator . . . for a cumulative period of not less than one year (§ 725.101(a)(32)).

20 C.F.R. § 725.494(c) (2005). The regulation at § 725.101(a)(32) in turn provides:

> (32) *Year* means a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 "working days." A "working day" means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave.

[2] Claimant also testified that, at the time of the hearing, he had a 25 year old stepson, Leonard New, Jr., attending college. TR. at 16. Claimant stated that he "would try to help" his stepson financially and that his stepson would graduate in May 2006. TR. at 16. Because, as will be discussed, this claim must be denied on its merits, the issue of whether benefits would be augmented by reason of the miner's stepson is rendered moot.

20 C.F.R. § 725.101(a)(32) (2005).

Thus, under the regulations, liability may attach to an operator if it most recently employed the miner for a cumulative period of one year *during which time the miner spent an actual 125 working days at the mine site.* The 125 day rule, as the requirement has become known, is in place to ensure a miner's employment with a company is "regular." For example, as will be discussed in this case, Tennessee Coal Company laid off the miner around August of 1997, but the miner testified that he was paid wages for the ensuing six months on a weekly or biweekly basis. As a result, the miner continued to be wages by Tennessee Coal, but he was not actually at the company's mine site performing his duties as a roof bolter operator. This six month time period could not be used to establish that the miner spent an actual 125 working days at Tennessee Coal's mine site. On the other hand, this six month period may be included to determine whether the miner was "employed" by Tennessee Coal for at least a calendar year.

Documentary evidence and Claimant's testimony

On October 30, 2002, Claimant submitted a Form CM-911a setting forth his employment history. DX 4. Relevant to the issue of designation of the proper operator, Claimant stated that he last worked for Tennessee Coal Corporation from 1997 to 1998 as a roof bolter operator. Prior to that time, Claimant worked for U.S. Coal from 1995 to 1997 in "underground extraction." At the hearing, Claimant testified that he left U.S. Coal in November or December of 1996 because he suffered an injury on the job and his supervisor was "not concerned." TR. at 37-38. He obtained employment with Tennessee Coal "within days" of leaving U.S. Coal. TR. at 38-39. As Claimant recalled, he started working for Tennessee Coal "just as soon as I could take a physical for Tennessee Coal." TR. at 39. The record contains testing conducted by Dr. Baker on December 13, 1996 in conjunction with Claimant's fitness-for-employment examination for Tennessee Coal. DX. 13. By note dated December 13, 1990, Dr. Baker concluded that the miner was fit for employment with Tennessee Coal Company. DX. 13. The only restriction noted was that Claimant must have a "yearly chest x-ray."

Claimant submitted certain W-2 statements. DX. 6. A W-2 from Tennessee Coal for the year 1997 reveals wages totaling $22,660.54 paid to Claimant. Claimant stated that he could not locate all of his W-2 forms and no W-2 statement for 1996 from Tennessee Coal was submitted. Additionally, Claimant submitted a W-2 form from U.S. Coal, Incorporated demonstrating $3,353.28 in wages paid for the year 1995, $30,287.19 in wages paid for 1996, and $726.03 in wages paid in 1997.

The miner's Social Security Earnings Statement demonstrates an income of $22,660.54 in 1997 from Tennessee Coal. DX 7. No income from the company was recorded for 1996 or 1998.

At the hearing, Claimant testified that he worked for Tennessee Coal Company from December 15, 1996 until August 3, 1997. TR. at 25-26. In recalling the beginning and ending dates of his employment for Tennessee Coal, the miner stated, "I was just guessing, because I knowed (sic) it was in the last part of that year, and I was thinking it was in June or July or

August, somewhere, when they shut the mines down." TR. at 26. He explained that he could not "remember exactly." TR. at 26.

When questioned by Judge Huddleston at the hearing, Claimant stated that he was laid off from Tennessee Coal and, although he was "not absolutely positive," the lay off occurred in the late summer or early fall. TR. at 36. Judge Huddleston continued with the questioning as follows:

Judge Huddleston: And how do you remember that?

Claimant: Because I remember it was real—very warm weather.

Judge Huddleson: What did you do when you got laid off?

Claimant: They let us draw unemployment, I think, for six months. No. I'm sorry, they paid us for six months just like we were working.

Judge Huddleston: They paid you actual wages for six months?

Claimant: Yes.

While employed for Tennessee Coal, Claimant testified that he worked full-time as "roof bolter" operator. TR. at 27. He normally worked five days per week, eight hours per day, and for eight hours every other Saturday. TR. at 27-28. Claimant was paid "time and a half" for working on Saturday. TR. at 28.

Arguments of the parties

By letter dated June 18, 2003, counsel for U.S. Coal asserted that Tennessee Coal Company should have been designated as the operator potentially liable for the payment of benefits. DX. 22. In support of this assertion, counsel attached copies of the miner's hand-written employment history as well as W-2 forms, including a 1997 W-2 from Tennessee Coal demonstrating earnings of $22,660.54 for that year as compared to $726.03 in earnings from U.S. Coal for the same year. Employer did not address this issue further in its May 8, 2006 post-hearing brief.

At the hearing, Employer's counsel cited to his calculations in the June 18, 2003 letter as follows:

> The Table of Coal Mine Industry Average Earnings Table reflects that if a miner earned $19,010.00 or more in 1997, he probably worked more than 125 days as a miner and would meet the definition of 'year' pursuant to 20 C.F.R. § 725.101(32). [The Claimant] earned $22,660.54 from his employment with The Tennessee Coal Company in 1997. Thus, from the record it appears that [the

> Claimant] worked more than 125 days for Tennessee Coal Company and that at least some of his employment occurred after working for U.S. Coal. Hence, it appears that, pursuant to 20 C.F.R. § 725.101(32)(iii), you may find that Tennessee Coal Company is the responsible operator under this claim.

DX. 22.

Counsel for the Director submitted a brief on April 24, 2006. She asserts that U.S. Coal Incorporated has been properly named as the responsible operator in this claim:

> The Social Security Administration Earnings Records show employment with U.S. Coal, Inc. from 1995-1997 and employment with Tennessee Coal in 1997 (Director's Exhibit "DX" 7). The miner listed his dates of employment with Tennessee Coal from December 15, 1996 to August 3, 1997. He indicated he was laid off from Tennessee Coal in 1997. There was no W-2 for Tennessee Coal in 1998, according to the miner (DX 6).

Director's Post-Hearing Brief at 1-2. From this, the Director maintains that the miner did not work for Tennessee Coal for a cumulative period of one year such that liability is properly assessed against U.S. Coal.

Findings of fact and conclusions of law

Determining length of coal mine employment for purposes of assessing liability against a responsible operator can present a quagmire of regulatory analysis. For purposes here, there are two calculations of length of coal mine employment relevant to determining the proper responsible operator. First, it must be determined whether the miner worked for Tennessee Coal Company for a "calendar year." This is the calculation addressed by the Director in her brief and at hearing. Second, within the calendar year that Claimant was on the payroll for Tennessee Coal Company, it must be determined whether he spent at least 125 actual working days at the mine site. This calculation serves as the focus of Employer's arguments.

The Director does not seem to take issue with the fact that Claimant spent 125 working days at the mine site of Tennessee Coal Company; rather, the Director asserts that, since the miner testified that he worked for the company from December 15, 1996 until August 3, 1997, then, on its face, he did not have a full calendar year of employment with Tennessee Coal. At the hearing, prior to Claimant's testimony, Employer's counsel conceded this assertion by the Director. TR. at 14.

Based on the foregoing, it is determined that the miner spent an actual 125 working days at the mine site while employed by Tennessee Coal. In particular, it is undisputed that the miner earned $22,660.54 from Tennessee Coal during 1997. Based on Claimant's testimony, he worked eight hours a day for five days a week as well as eight hours a day every other Saturday from December 15, 1996 to August 3, 1997. Claimant's testimony is not contradicted and this

constitutes a sufficient period of time for Claimant to have spent an actual 125 days at Tennessee Coal's mine site.

In addition, it appears from Claimant's testimony that he was on the payroll for Tennessee Coal for a full calendar year. Notably, Claimant testified that after he worked for Tennessee Coal from December 15, 1996 until August 3, 1997, he was laid off but Tennessee Coal continued to pay Claimant wages for another six months. Although this six month period of time would not assist Claimant in establishing at least 125 actual working days at the mine site, it is properly counted in determining whether the miner worked for Tennessee Coal for a period of one calendar year. As such, it appears that Tennessee Coal should have been designated by the district director as the operator liable for the payment of benefits on this claim.

Had benefits been awarded, however, the undersigned Administrative Law Judge would have been compelled to assess liability against U.S. Coal. This is because, under the amended regulations, the named Employer (1) has the burden of demonstrating the liability of another employer, and (2) it must present evidence on the issue while the claim is pending before the district director. In this case, Employer failed to present sufficient evidence pertaining to the designation of Tennessee Coal while the claim was pending before the district director. Pursuant to § 725.414(d) and 725.457(c)(1), documentary evidence or testimony cannot be presented to the undersigned unless such evidence was before the district director, or a party demonstrates "extraordinary circumstances" to permit consideration of such evidence at this level. Because U.S. Coal made no proffer of "extraordinary circumstances" to consider new information gathered from Claimant's testimony at the hearing, if benefits had been awarded, U.S. Coal would have been held liable for their payment.

However, since the evidence does not establish entitlement to benefits, the district director may revisit this issue should the miner file a petition for modification under 20 C.F.R. § 725.310 or a subsequent claim under 20 C.F.R. § 725.309.

The Standard for Entitlement

Because this claim was filed after April 1, 1980, it is governed by the regulations at 20 C.F.R. Part 718 (2005).[3] Under Part 718, Claimant bears the burden of establishing each of the following elements by a preponderance of the evidence: (1) he suffers from pneumoconiosis; (2) arising out of coal mine employment; (3) he is totally disabled; and (4) his total disability is caused by pneumoconiosis. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986) (en banc); *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65 (1986) (en banc). Failure to establish any one of these elements precludes entitlement to benefits.

[3] As Claimant last engaged in coal mine employment in the State of Tennessee, appellate jurisdiction of this matter lies with the Sixth Circuit Court of Appeals. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (en banc).

Existence of Pneumoconiosis and Its Etiology

Under the amended regulations, "pneumoconiosis" is defined to include both clinical and legal pneumoconiosis:

> (a) For the purpose of the Act, "pneumoconiosis" means "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.
>
> > (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. The definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
> >
> > (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (2005). Moreover, the regulations at 20 C.F.R. § 718.203(b) (2005) provide that if a miner suffers from pneumoconiosis and has engaged in coal mine employment for ten years or more, as in this case, there is a rebuttable presumption that the pneumoconiosis arose out of such employment.

The existence of pneumoconiosis may be established by any one or more of the following methods: (1) chest x-rays; (2) autopsy or biopsy; (3) by operation of presumption; or (4) by a

physician exercising sound medical judgment based on objective medical evidence. 20 C.F.R. § 718.202(a) (2005).[4]

When weighing chest x-ray evidence, the provisions at 20 C.F.R. § 718.202(a)(1) (2005) require that "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays."[5] In this vein, the Board has held that it is proper to accord greater weight to the interpretation of a B-reader or Board-certified radiologist over that of a physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983). Moreover, an interpretation by a dually-qualified B-reader and Board-certified radiologist may be accorded greater weight than that of a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). The following chest roentgenogram evidence is in the record:[6]

Exhibit #	Date of Study / Date of Reading	Physician	Qualifications B-Reader (B) / Board Cert. (BCR)	Film Quality	Reading
DX 16	04-14-83 04-14-83	Hall (hospitalization/treatment)	Radiologist	Readable	--; "The heart and great vessels are normal. No hilar or mediastinal masses are seen. There is some scattered perihilar calcification present. I see no consolidation in the lungs. There is a questionable small nodule projecting at the end of the left 4th rib. This could be superimposition of shadows, I cannot see them on the lateral view. However, without any old films for comparison, I believe this needs to be followed up, and either some tomograms or oblique films of the left chest are recommended."
DX 16	04-15-83 04-15-83	Schultz (hospitalization/treatment)	Unknown	Readable	--; "PA-lateral views of the chest show both lung fields to be well expanded

[4] There is no autopsy or biopsy evidence in this record and the presumptions contained at §§ 718.304 - 718.306 are inapplicable such that these methods of demonstrating pneumoconiosis will not be discussed further.

[5] A"B-reader" (B) is a physician, but not necessarily a radiologist, who successfully completed an examination in interpreting x-ray studies conducted by, or on behalf of, the Appalachian Laboratory for Occupational Safety and Health (ALOSH). A designation of "Board-certified" (BCR) denotes a physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association.

[6] A "--" under the *Reading* column of the chart indicates that the physician did not provide a specific category reading under the ILO-U/C classification system. 20 C.F.R. §§ 718.102 and 718.202(a)(1) (2001).

					and clear. The heart is of normal size. Castophenic angles sharp. Impression: No active disease."
DX 16	04-04-90 04-05-90	Hall (hospitalization/treatment)	Radiologist	Readable	--; "The heart is small. The central vessels are slightly dilated. I do not detect hilar or mediastinal masses. No active infiltrate is noted in the lungs. There is slight flattening of the diaphragm. The visualized bony thorax is intact. Impression: No acute disease. The findings are compatible with some chronic obstructive pulmonary disease."
DX 13	12-13-96 12-13-96	Baker (fitness for employment examination)	B	1	0/1, p/q; three lung zones; follow-up on nodule in left upper lung
DX 13 and 16	12-27-96 01-02-97	Hall (fitness for employment Examination; follow-up x-ray examination as requested by Dr. Baker on December 13, 1996)	Radiologist	Readable	--; "Lungs show hyperexpansion consistent with some degree of COPD"; "Some scarring is noted in the hilar regions and in the lung apecies. This at least in part could be related to granulomatous disease. Other considerations could include occupational exposure type diseases."
DX 11	12-10-02 12-10-02	Baker	B	1	1/0, p/p; three zones
DX 12	12-10-02 12-21-02	Barrett	B, BCR	1	Quality reading only
EX 2	12-10-02 05-29-04	Wiot	B, BCR	1	No evidence of coal workers' pneumoconiosis

Based on the foregoing, Claimant has not established that he suffers from clinical pneumoconiosis. Interpretations of studies dated April 14, 1983, April 15, 1983, April 4, 1990, and December 27, 1996 do not contain an ILO classification as required by the regulations at 20 C.F.R. § 718.202(a)(1) (2005). As a result, these studies do not demonstrate the presence, or absence, of pneumoconiosis. On occasion, the studies were interpreted as revealing changes consistent with chronic obstructive lung disease, the cause of which "could include occupational exposure type diseases." These findings do not equate to a finding of clinical pneumoconiosis under the regulations.[7]

[7] In addition, the observations do not support a finding of legal coal workers' pneumoconiosis as no physician specifically attributed the miner's chronic obstructive pulmonary disease to his exposure to coal dust.

Of the remaining studies, Dr. Baker concluded that the December 13, 1996 study revealed Category 0/1 pneumoconiosis. Under the regulations, this study does not support a finding of the disease.

The December 10, 2002 study was interpreted by two physicians.[8] Dr. Baker, a NIOSH-certified B-reader, concluded that the study yielded findings of Category 1 pneumoconiosis. To the contrary, Dr. Wiot, who is a B-reader and board-certified radiologist, concluded that the study was negative for the presence of coal workers' pneumoconiosis. Given Dr. Wiot's dual-qualifications, his interpretation is accorded greater weight and the study does not support a finding of the disease.

Based on the foregoing, none of the studies support a finding of pneumoconiosis. Indeed, the most recent study of record, dated December 10, 2002, establishes via Dr. Wiot's interpretation, that the miner does not suffer from the disease. Consequently, the miner has not sustained his burden under § 718.202(a)(1) of the regulations.

However, Claimant may also establish that he suffers from the disease by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be considered adequately documented if it is based on items such as a physical examination, symptoms, and the patient's history. *See Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984).

A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields, supra*. Indeed, whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (en banc). Moreover, statutory pneumoconiosis is established by well-reasoned medical reports which support a finding that the miner's pulmonary or respiratory condition is significantly related to or substantially aggravated by coal dust exposure. *Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988).

Claimant's testimony

Claimant testified that all of his coal mine employment occurred underground. TR. at 18. He breathed dust on a regular basis. TR. at 19. When asked whether he wore a mask, Claimant responded as follows:

> I did in some places, you know, where they had the dust masks, but most of the time we didn't have a dust mask, and I guess you just get in the habit of going in and not wearing it, because you don't think about it.

TR. at 20.

[8] Dr. Barrett reviewed the study for quality purposes only and determined that the study quality was "1." DX. 12.

Claimant recalled that he last worked as a miner in 1997, while in the employ of Tennessee Coal Company. TR. at 20. He had difficulty breathing when he left the mines and the problem has continued to worsen. TR. at 21. When asked to describe his current respiratory condition, Claimant testified as follows:

> Well, I noticed at work, when I have to go up in the office, and you've got to climb a set of stairs, time I get to the top of the stairs, you know, I'm out of breath. I just have to stop and catch my breath. And at night when I go to bed, I have a lot of difficulty breathing, and I have to, you know, try to prop myself up.

TR. at 22. Further, Claimant suffers from episodes of wheezing and coughing, where the cough is "usually dry." TR. at 22-23.

He awakens in the night with a feeling of "smothering." TR. at 23. Claimant notes that "[h]ere lately, it's sometimes twice a night but it was, you know, just every once in a while, maybe once a week, and it's getting worser (sic)." TR. at 23. Claimant states that he has more breathing difficulties going up stairs or inclines as well as walking on level ground for extended distances. TR. at 23. He testified that he could "probably" walk 100 yards without having to stop and rest." TR. at 23. Claimant asserts that he could not return to his previous coal mine employment because, in the six months preceding the hearing, he could not "hardly bend over to tie (his) shoes" without "smothering." TR. at 24-25.

Claimant's family physician, Dr. Patton, started prescribing an inhaler in the past year. TR. at 24. Claimant does not always use the inhaler and stated that "it makes me nervous taking something or other that I'm afraid I'll get addicted to." TR. at 24. He recalled that he last used an inhaler three months prior to the hearing. TR. at 34. Claimant also testified that he has "a lot of trouble with (his) sinuses" and he takes medication "to keep (his) sinuses cleared out." TR. at 33-34. Other than breathing difficulties, Claimant testified as follows:

> [T]he doctors told me that I have a calcium build-up on my arteries. If I'm understanding what they're telling me now, it's some kind of calcium that's building up on my arteries, and I've got a lot more arthritis than I used to have.

TR. at 32-33. Claimant confirmed that he had not been hospitalized in the two years preceding the hearing. TR. at 33.

Medical opinion evidence

A. Hospitalization and treatment records

The record contains certain treatment and hospitalization records dating from 1983 to 2003. DX. 16. Most of these records pertain to treatment of Claimant's renal malfunction and associated complications. The records do not contain diagnoses supporting the presence, or absence of, coal workers' pneumoconiosis[9]. Moreover, the records do not provide an assessment

[9] Notably, all chest x-ray and CT-scan evidence of the lungs have been recorded and considered in this claim.

of the miner's level of respiratory or pulmonary disability, if any. As a result, these records are not probative in assessing whether the miner is entitled to benefits under the Act and they will not be discussed further. Likewise, certain other medical records pertaining to treatment for back pain and recurring sinus infections are not probative in determining the medical issues in this claim; *to wit,* whether the miner is totally disabled due to coal workers' pneumoconiosis.

Finally, treatment records from Dr. Nancy West cover a period of time from 1990 to November 1992. DX. 17. The records indicate treatment for sinuses and that Claimant requested that his sugar level be checked. The records also demonstrate monthly prescription refills for "Entex LA." As none of the records address any element of entitlement relevant to this claim, they will not be discussed further.

B. CT-scan evidence under § 718.107

A CT-scan was conducted at the Lake Cumberland Regional Hospital on January 27, 2003 and Dr. Laura Webb Simons provided an interpretation of the study. DX. 15 and 16.

Exhibit #	Date of Study / Date of Reading	Physician	Interpretation
DX 15 and 16	01-27-03 01-27-03	Dr. Laura Webb Simons (Lake Cumberland Regional Hospital; comparison with x-ray films dated January 20, 1996 and December 19, 2002)	"Abnormal chest with bilateral pleural plaques and adjacent distortion of the interstitial markings, bilateral apical parenchymal bands of soft tissue thickening and with right lower lobe noncalcified nodules. The findings could all be related to post-inflammatory, post-infectious scarring. However, follow-up will be needed to confirm stability in order to exclude malignancy."

The qualifications of Dr. Simons are not in the record. Although she finds abnormalities in the miner's chest, her report does not contain any findings of clinical pneumoconiosis, or any other respiratory ailment related to coal dust exposure. As a result, the foregoing CT-scan does not support a finding of pneumoconiosis.

C. Dr. Glen Baker

The only medical report submitted in conjunction with this claim is the Department-sponsored medical examination conducted pursuant to 20 C.F.R. § 725.406 (2005). DX 11.

Dr. Glen Baker examined and tested the miner and issued a report on December 10, 2002. DX. 11. He reported 15 to 17 years of underground coal mine employment, where Claimant last worked as a roof bolter and temp supervisor in 1997. Dr. Baker further noted a history of smoking one and one-half a pack of cigarettes per day since the age of 17 years but that, at the time of the examination, Claimant smoked one-half a pack of cigarettes daily.[10]

[10] This smoking history is consistent with the history presented by Claimant at the hearing. Claimant testified that he smoked for "probably 15 or 20 years" and that he continued to smoke at the time of the hearing, although "not near as much . . .." TR. at 17. He stated that he had "cut back" on smoking within the past year and currently smokes "[l]ess than half a pack" a day. TR. at 18. Prior to reducing the extent of his smoking, Claimant smoked "usually around a pack, sometimes maybe a little over a pack." TR. at 18. In a similar vein, Dr. Baker noted that

The miner reported a history of arthritis of his right shoulder for the past two years as well as heart disease (he suffered from rheumatic fever as a child), and diabetes mellitus. He complained of experiencing daily dyspnea for the past year as well as orthopnea for the past two to three years.

Examination of the heart and lungs produced no abnormal findings. In addition, ventilatory testing, blood gas testing, and the EKG were normal. Dr. Baker concluded that the x-ray study underlying his report revealed Category 1 pneumoconiosis. Based on this x-ray finding and the miner's years of coal mine employment, Dr. Baker diagnosed the presence of coal workers' pneumoconiosis. He also concluded that the miner suffered from bursitis. On the other hand, Dr. Baker found that the miner suffered from no respiratory or pulmonary impairment stemming from pneumoconiosis.

Dr. Baker is a NIOSH-certified B-Reader. CX 1. He graduated from the University of Louisville School of Medicine in 1968 and is board-certified in internal medicine and pulmonary diseases. Currently, he is in private practice and he serves as a medical examiner for the U.S. Department of Labor. In the past, Dr. Baker served at the Baptist Regional Medical Center in Corbin, Kentucky as Director of the Department of Medicine, Director of the Intensive Care Unit, and Director of the Respiratory Care Unit.

Here, Dr. Baker diagnosed coal workers' pneumoconiosis based solely on the positive x-ray interpretation underlying his report as well as the fact that Claimant worked in the coal mines for 16 years. Dr. Baker's opinion is not sufficiently probative to support a finding of the disease. In particular, his positive x-ray interpretation was outweighed by the negative interpretation of a physician with higher radiological qualifications. Likewise, none of the remaining studies of record supports a finding of clinical pneumoconiosis and the undersigned Administrative Law Judge has determined that the x-ray evidence, as a whole, is preponderantly negative on this record. Dr. Baker did not find that Claimant suffered from any form of legal coal workers' pneumoconiosis such that the miner has not sustained his burden under § 718.202(a)(4) of the regulations.

In sum, the chest x-ray, CT-scan, and medical opinion evidence do not support a finding that Claimant suffers from clinical or legal coal workers' pneumoconiosis.

Total Disability Due to Pneumoconiosis

Benefits are provided under the Act for, or on behalf of, miners who are totally disabled due to pneumoconiosis. 20 C.F.R. § 718.204(a) (2005). The regulations further state the following:

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the miner smoked one pack of cigarettes per day for 30 years during a visit on December 20, 1999. DX. 16. In a later visit on October 10, 2000, he recorded a one and one-half a pack per day smoking habit. Notably, these notes also reveal that, on December 20, 1999, Claimant complained of a productive cough and underwent a skin test for tuberculosis.

> For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.

20 C.F.R. § 718.204(a) (2005).

Moreover, pneumoconiosis must be a "substantially contributing cause" to the miner's total disability. 20 C.F.R. § 718.204(c)(1) (2005). The regulations define "substantially contributing cause" as follows:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. § 718.204(c)(1) (2005).

Twenty C.F.R. § 718.204(b) (2005) provides the following five methods to establish total disability: (1) qualifying pulmonary function studies; (2) qualifying blood gas studies; (3) evidence of cor pulmonale with right-sided congestive heart failure;[11] (4) reasoned medical opinions; and (5) lay testimony.[12]

Total disability may be established through a preponderance of qualifying pulmonary function studies. The quality standards for pulmonary function studies are located at 20 C.F.R. § 718.103 (2005) and require, in relevant part, that (1) each study be accompanied by three tracings, *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984), (2) the reported FEV1 and FVC or MVV values constitute the best efforts of three trials, and, (3) for testing conducted after January 19, 2001, a flow-volume loop must be provided. The administrative law judge may accord lesser weight to those studies where the miner exhibited "poor" cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945 (1984). To be qualifying, the regulations provide that the FEV1 be qualifying *and* either (1) the MVV or FVC values must be equal to or fall below those values listed at Appendix B for a miner of similar gender, age, and height, or (2) the result of the FEV1 divided by the FVC is equal to or less than 55 percent. The following pulmonary function studies are in the record:

[11] There is no evidence of cor pulmonale with right-sided congestive heart failure such that this method of establishing total disability will not be discussed further.

[12] The Board holds that a judge cannot rely solely upon lay evidence to find total disability in a living miner's claim. *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994).

Exhibit / Date of Test / Physician	Age / Height (in.)	Coop./ Comp. Noted	Tracings / Flow Vol. Loop	Broncho-dilator (pre/post)	FEV1	FVC	MVV	FEV1/ FCV Ratio	Qualifies?
DX 13 12-13-96 Baker (fitness for employ-ment exam)	44/65"	Not noted	yes /yes	Pre	3.78	4.81	Not stated	79	No
				Post					
DX 11 12-10-02 Baker	50/65"	Not noted	yes/yes	Pre	3.37	4.16	Not stated	81	No
				Post					

Based upon the foregoing, Claimant has not established total disability pursuant to § 718.204(b)(2)(i) (2005) of the regulations. Neither of the studies yielded qualifying values.

Total disability may also be established by qualifying blood gas studies under 20 C.F.R. § 718.204(b)(2)(ii) (2005). In order to be qualifying, the PO2 values corresponding to the PCO2 values must be equal to or less than those found at the table at Appendix C. The following blood gas studies are in the record:

Exhibit / Date of Test /	Physician	Altitude (feet)	Resting (R) Exercise (E)	PCO2	PO2	Qualifies?
DX 11 12-10-02	Baker	0-2,999	R	40	86	No
			E	43	81	No

Based upon the foregoing, Claimant has not demonstrated total disability pursuant to § 718.204(b)(2)(ii) (2005) of the regulations. Dr. Baker's study produced non-qualifying results at rest and after exercise.

The final method by which Claimant may establish total disability is through medical opinion evidence wherein a physician has exercised reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques to conclude that the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment or comparable employment. 20 C.F.R. § 718.204(b)(2)(iv) (2005).

Initially, Claimant has the burden of establishing the exertional requirements of his usual coal mine employment. *Onderko v. Director, OWCP*, 14 B.L.R. 1-2 (1989). Once a claimant establishes that he is unable to perform his usual coal mine employment, a *prima facie* case for total disability exists, and the burden shifts to the party opposing entitlement to prove that the

claimant is able to perform comparable and gainful work. *Taylor v. Evans and Grambrel Co.*, 12 B.L.R. 1-83, 1-87 (1988).

On October 30, 2002, Claimant completed a CM-913 and set forth the duties required of his last coal mine employment as a roof bolter. DX 5. He noted the following:

> Job was to install 6' roof bolts by drilling holes into the roof(.) [W]hen hole was drilled I put glue into hole and then the bolts(.) [T]his was to make the roof safe to keep it from falling in.

DX. 5. The job required standing for eight hours per day as well as lifting 50 pounds 20 times per day and lifting 30 to 40 pounds 20 times per day. Claimant also carried 50 pounds 60 to 100 feet five times per day.

Claimant stated that he operated a "swinghead" roof bolter and he had to "know when there w(ere) creaks in the roof when drilling test holes." Claimant further explained:

> We had to carry rock dust to different areas to rock dust belt lines and face areas also carry crib blocks to belt line and different areas to build roof support(.)
>
> Loading roof bolts and roofbolt plat(e)s for roof bolter also steel strips.

DX. 5.

Since his last coal mining job, Claimant has worked in non-coal related employment. At the time of the hearing, Claimant worked for Toyota as a team leader or supervisor and he primarily conducted training. TR at 29. He stated that he walks around certain parts of the facility:

> I'm over three different presses, and they're probably 200 feet, you know, in that area. And I have to—you know, I'm constantly having to walk back and forth all night.

TR. at 29. He further states that he spends "[a]t least seven hours" on his feet "because, you know . . . the guys, when they bring them in, it's my job to train them":

> And usually they'll bring in one (trainee) every other week, and then I've got to start over training. When the presses are running, I still have to go from each press . . . each hour to check the parts and make sure they're good, so it keeps me busy walking back and forth.

TR. at 29-30. At the time of the hearing, Claimant had worked for Toyota for two and one-half years. TR. at 30. He testified that he works "a lot of overtime" and may earn 12 to 16 hours per week in overtime for Toyota. TR. at 34.

Prior to working for Toyota, Claimant worked for another non-coal-related plant facility, Wabash. TR. at 30. He recalled the following:

> [W]hen I first started out, the first six months I was an operator, operating machines. And I went to supervisor after about six months, I think. And that's what I done there was train people and go make sure the presses were going and taking care of the people.

TR. at 30. He noted that the Wabash facility was dusty:

> There's a lot of welding dust. I guess you'd call it welding dust. I mean, the area that I was in, it was away from it, but, you know, the dust would sometimes still float over into our area, but it was just mostly welders.

TR. at 30-31.

Claimant testified that he "used to love to hunt and fish" but he does not "have the energy" to engage in these activities at present. TR. at 35. At the hearing, Claimant stated that he does not have a hunting or fishing license, nor does he have any "side jobs." TR. at 31-32. Moreover, he has no garden and his wife mows the yard. TR. at 32.

Based on this record, it is determined that Claimant performed heavy manual labor. Comparing the exertional requirements of his last coal mining job with the physical limitations demonstrated on this record, it is determined that Claimant has not established that he is totally disabled under 20 C.F.R. § 718.204(b)(2)(iv) (2005) through a preponderance of the medical opinion evidence of record.

While Claimant has testified that, from a physical standpoint, he could not perform his prior job as a roof bolter operator, a finding of total disability must rest on the medical evidence. In this case, Dr. Baker noted that the degree of severity of the miner's respiratory or pulmonary impairment as "none." His opinion on this issue is well-documented as the ventilatory and blood gas testing underlying his report yielded non-qualifying results. There are no other physicians of record who conclude that the miner suffers from a totally disabling respiratory impairment. As a result, the miner has not presented evidence sufficient to support a finding of total disability under § 718.204 of the regulations. Accordingly,

ORDER

IT IS ORDERED that the claim for benefits filed by GC is denied.

A

William S. Colwell
Associate Chief Administrative Law Judge

Washington, D.C.
WSC:SKF

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is:

Benefits Review Board
U.S. Department of Labor
P.O. Box 37601
Washington, DC 20013-7601

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481. If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).